(2)

IN THE HIGH COURT OF JUDCATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No. 1514 /2005

Petitioner : K.P. Patel, aged 59 years,
S/o Late Shri Ramshankar patel,
Executive Engineer (Civil) Water
Resource Division, Jashpur Nagar,
Chhattisgarh.

-:**Versus**:-

Respondent :

1. State of Chhattisgarh through Principal Secretary, Water Resources Department, D.K. Bhawan, Raipur, Chhattisgarh

2. Chief Engineer, Hasdeo Kachhar Water Resources Department, Bilaspur, Chhattisgarh.

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WRIT PETITION UNDER ARTICLES 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT OF MANDAMUS, CERTIORARI, QUO WARRANTO, PROHIBITION AND/OR ANY OTHER WRIT/ORDER/DIRECTION ON THE SAME NATURE IN THE CIRCUMSTANCES OF THE CASE.

AFR (149)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 1514 of 2005

K. P. Patel

-Versus-

State of Chhattisgarh and another

Post for order on 7th September, 2005.

Sd/-
Satish K. Agnihotri
Judge

(145)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Writ Petition No. 1514 of 2005

K. P. Patel

-Versus-

State of Chhattisgarh and another

Petitioner by Shri Sanjay K. Agarwal, Advocate.

Respondents by Shri V. V. S. Moorty, Deputy Advocate General.

ORDER

(7.9.2005)

By Justice Satish K. Agnihotri.

1. The present petition challenges the order dated 1.4.2005 passed by the Water Resources Department, Govt. of Chhattisgarh, Raipur, whereby the petitioner, who was working as Assistant Engineer (Civil) was promoted to the post of Executive Engineer (Civil) on ad hoc basis by order dated 9.9.2003 has not been confirmed on regular basis and the petitioner has been reverted back to his original post i.e. Assistant Engineer.

2. By amendment of the petition, the petitioner further seeks a direction against the respondents to consider the petitioner for regular promotion on the post of Executive Engineer w.e.f. 1.4.2005 with all consequential benefits. The amendment in the prayer was allowed on 27.6.2005.

3. The undisputed facts, in brief, are that the petitioner was working as Assistant Engineer in the Water Resources Department, Govt. of Chhattisgarh when by order dated 9.9.2003 he was promoted to the post of Executive Engineer along with others on ad hoc basis. Subsequently by order dated 1.4.2005 the petitioner was not confirmed on regular basis on

the post of Executive Engineer as such the petitioner was reverted back to the original post of Assistant Engineer. The petitioner filed this petition challenging the order dated 1.4.2005 Annexure P/1. Learned counsel for the petitioner submitted that the petitioner has been denied regular promotion on the post of Executive Engineer in violation of the Rule 6(5) and 7 of the Chhattisgarh Public Services (Promotion) Rules, 2003 (hereinafter 'Rules,2003').

4. Learned counsel for the petitioner submitted that the petitioner was fit for promotion as no departmental enquiry and/or criminal case was pending against the petitioner. There was no adverse entry/remark in the confidential report of the petitioner from the date of the ad hoc promotion till consideration by the Departmental Promotion Committee (hereinafter 'D.P.C.') for regular promotion to the post of Executive Engineer as nothing adverse was communicated to the petitioner. Learned counsel further submitted that the petitioner has made a comparative assessment of the merits of the candidates to determine who is 'very good', 'good' or 'does not have required criteria', as stated by the respondents in its reply in para 2 to the effect that "*It is most respectfully submitted that the confidential report of 5 years has been considered and as the petitioner's Confidential Report was not fulfilling the criteria, therefore, petitioner found unfit for regular promotion.*" , **and** in para-5 of the reply to the effect that "*It is pertinent to mention here that on the basis of Confidential Report, each and every employee earn points and as alleged juniors to the petitioner were having better Confidential Reports then the petitioner, therefore, they have earned more points and on the basis of same Departmental Promotion Committee found*

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them suitable for regular promotion to the post of Executive Engineer and further found that the petitioner herein is not at all fit for regular promotion to the post of Executive Engineer." The criteria of the promotion from the post of Assistant Engineer to the post of Executive Engineer as per Rule 4 of the Rules, 2003 is 'seniority subject to fitness'. It was further contended that Rule 6(7) of the Rules, 2003 clearly provides that the D.P.C. shall consider the case of each public servant separately on the basis of their own merit, and that there shall be no need to make a comparative assessment of the merits of public servant separately and shall categorize them as 'fit' or 'not fit'.

5. Learned counsel for the petitioner further contended that since the D.P.C. has considered the case of the petitioner along with other candidates on the basis of the comparative assessment, the said proceedings be quashed and the respondents be directed to make a fresh consideration strictly in accordance with the Rule 6 of the Rules, 2003.

6. Learned counsel for the petitioner riled on the decisions of the Supreme Court in Dharamveer Singh Tomar Vs. Delhi Administration & others, (1991) Supp. 2 SCC 635 and Union of India & others Vs. Ltd. Gen. Rajendra Singh Khadyan & another, (2000) 6 SCC 698. Learned counsel further relied on the decision in the case of Gurdial Singh Fijji Vs. State of Punjab & others, (1979) 2 SCC 368 and Union of India & others Vs. E.G. Nambudiri, (1991) 3 SCC 38, and Karnail Singh Vs. State of Punjab & others (1994) Supp. 3 SCC 724 to support his contention that if there is any adverse entry/rmark which affects rights of the Govt. servant relating to the confirmation, crossing of efficiency bar, promotion and retention in service,

the principles of natural justice require the reporting authority to communicate the same to the Govt. Servant. Since there was no communication of any adverse entry/remark which has affected the case of the petitioner for the purpose of categorizing him 'fit' under Rule 6(7) of the Rules, 2003, categorization of the petitioner as 'not fit' was bad and violative of Rule 6 (5) and (7) of the Rules 2003. The petitioner ought to have been categorized as 'fit' on the basis of the individual merit and to have been selected on the basis of seniority list.

7. Shri V. V. S. Moorthy, learned Deputy Advocate General submitted that the D.P.C. has considered the records of all the individual candidates, individually, and the awarding of points was for assessing them to categorize as 'fit' or 'not fit'. Since the petitioner was found 'not fit' on the basis of his confidential reports as "not having the required criteria", is not entitled to promotion to the post of Executive Engineer on regular basis. Accordingly, the petitioner was reverted back to the post of Assistant Engineer from the post of Executive Engineer as he was promoted on ad hoc basis. It was further contended that the criteria for promotion to the post of Executive Engineer is one and the same for 'ad hoc' as well as for 'regular' promotion. The D.P.C. found the petitioner 'fit' while considering him for promotion to the post of Executive Engineer on 'ad hoc basis' and after about two years while considering for the promotion on 'regular basis' the petitioner was found 'not fit' because he did not fulfill the required criteria.

8. Learned counsel next contended that the Courts in exercise of its jurisdiction under Article 226 of the Constitution of India should be extremely careful while dealing with the assessment

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made by the Departmental Promotion Committee. The High Court should exercise its jurisdiction only in exceptional cases wherein the Departmental Promotion Committee has committed gross irregularities or assessment is based on inadmissible or irrelevant or insignificant material. Learned counsel relies on the decision of Supreme Court in the case of Badrinath Vs. Government of Tamil Nadu & others, AIR 2000 S.C. 3243.

9. After having heard learned counsel for the parties and perusing the records of the proceedings, as produced by learned counsel for the respondents for perusal of the Court, it is found that the petitioner was considered 'fit' for 'ad hoc promotion' to the post of Executive Engineer after considering the confidential reports of the preceding five years, wherein the petitioner was graded as A, A, B, C, C, up to the year 2001-2002 and was categorized as 'fit'. Subsequently, while considering for promotion on 'regular basis', the D.P.C. on consideration recorded that the petitioner did not meet the required criteria and other candidates were marked 'very good' or 'good'. On the basis of this valuation the petitioner was categorized as 'not fit'. However, the select list was prepared strictly in accordance with the seniority. The record of the proceedings of the D.P.C. for consideration of the petitioner along with other candidates did not indicate the grading of confidential reports so as to come to the conclusion that the petitioner did not possess the required criteria.

10. Rule 4 of the Rules 2003 provides for Determination of basis for promotion. In the present case the basis for promotion is 'seniority subject to fitness'.

11. Rule 6 of the Rules, 2003 provides Promotion on the basis of seniority subject to fitness, which reads as under:-

"6. Promotion on the basis of seniority subject to fitness.- (1) In such cases where the promotion is to be made on the basis of seniority subject to fitness, there shall be no zone of consideration for all categories.

(2) The names of only such public servant shall be considered for promotion, who have completed the prescribed qualifying service in their feeder cadre / part of the service / pay scale of post according to the Recruitment Rules. It is, however, not necessary to consider all the names of public servant who have completed the prescribed minimum length of service but only such number of cases of public servant shall be considered according to the seniority, which shall be sufficient to cover the number of exiting and anticipated vacancies due to retirement during the year under each category. In addition to this, with a view of inclusion, in the select list, the names of two public servants or 25 percent of the number of the public servants included in select list whichever is more, the names of the required number of the public servants shall be considered for each category to fill up the unforeseen vacancies occurring during the course of the aforesaid period.

Explanation.- Manner of computation for eligibility for promotion.- Period of qualifying service on 1st January of the relevant year in which Departmental Promotion Committee is convened shall be counted from the calendar year in which the public servant has joined the feeding cadre / part of the service / pay scale of the post and not from the date of joining of the cadre / part of the service / pay scale of post.

(3) The number of vacancies for promotion during the course of the year i.e. from 1st January to 31st December shall be worked out after taking into account the existing and anticipated vacancies on account of retirement, and promotions to higher cadres / part of the service / higher pay scale of posts. Vacancies arising out of deputation for periods exceeding one year shall also be taken into account. The number of vacancies to be reserved for public servants belonging to Scheduled Castes and Scheduled Tribes shall be worked out on the basis

of the roster which is required to be maintained in accordance with the provisions of Rule 9 of these Rules.

(4) The meeting of the Departmental Promotion Committee shall be held every year. It shall consider the suitability of the public servants for promotion separately with reference to the vacancies of each year starting with the earliest year onwards. The Departmental Promotion Committee shall consider the suitability of the public servants for promotion to fill up the unfilled vacancies of the earlier year or years separately and prepare the select list for the relevant year accordingly. Thereafter, the Departmental Promotion Committee shall consider the suitability of the public servants for promotion to fill up the existing and anticipated vacancies of the current year.

(5) The Departmental Promotion Committee shall assess the suitability of the public servants for promotion on the basis of their service record and with particular reference to the Annual Confidential Reports (ACRs) for 5 preceding years. However, in cases where the required qualifying service is more than 5 years, the Departmental Promotion Committee shall see the record with particular reference to the ACRs for the years equal to the required qualifying service.

(6) When one or more ACRs are not available for any reasons for the relevant period, the Departmental Promotion Committee shall consider the ACRs of the years preceding the period in question.

(7) For filling up the posts by this method, the Departmental Promotion Committee shall consider the case of each public servant separately on the basis of their own merit, that is to say, that there shall be no need to make a comparative assessment of the merits of public servant. The Departmental Promotion Committee shall consider the records of each public servant separately and shall categorise them as 'fit' or ' not fit'.

(8) Separate select lists shall be prepared for the public servants of unreserved category, Scheduled Castes and Scheduled Tribes category in which the names of such number of public servants belonging to unreserved category, Scheduled Castes and Scheduled Tribes category shall be included which is equal to

the number of posts reserved for each of these cagtegories. In addition to this, names of two public servants or twenty five percent of the number of public servants included in the select list whichever is more, will also be included in the select list of each category as prescribed in sub-rule(2).

(9) The names of public servants included in each list shall be arranged in the same order of their seniority, as they existed in the cadre / part of the service / pay scale of post from which promotion is to be made.

(10) The promotion of public servants shall be made from these separate select lists according to their seniority in the feeder cadre / part of the service / pay scale of post and according to the prescribed order shown in the roster.

(11) In order to determine the inter-se seniority of the public servants belonging to the three categories in the cadre / part of the service / pay scale of post to which promotion is to be made, a combined select list of the above three categories of public servants shall be prepared in the same order in which their names appear in the seniority list of the cadre / part of the service / pay scale of post from which the promotion is being made.

(12) The names of public servants promoted on the basis of above combined select list shall be placed enblock below the name of last public servant promoted on the basis of the immediately preceding year's combined select list.

(13) The reserved posts which remain unfilled due to non-availability of suitable public servants of the category for which the post is reserved despite consideration of the names of all public servants eligible for consideration as per the Recruitment Rules shall be carried forward, that is to say, shall be kept vacant until the suitable public servant belonging to that reserved category is available. In no circumstances any vacancy of reserved category shall be filled-up by promotion from the public servant belonging to any other category.

(14) Wherever the reserved vacancies for Scheduled Castes and Scheduled Tribes in all cases of promotion have remained unfilled in the earlier year or years, the backlog and/or carried forward vacancies would be treated as a separate and distinct

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group and will not be considered together with the reserved vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year. In other words, the ceiling of fifty percent on filling up of reserved vacancies would apply only on the reserved vacancies which arise in the current year and the backlog /carried forward reserved vacancies for Scheduled Castes or Scheduled Tribes of earlier year or years would be treated as a separate and distinct group and would not be subject to ceiling of fifty percent:

Provided that the appointing authority shall convene a special meeting of Departmental Promotion Committee within six months to fill up backlog vacancies and if such vacancies still remain unfilled, they shall not be de-reserved in any manner for filling up by the public servants not belonging to the category for whom the post or posts are reserved.

(15) When a public servant, whose name is included in the select list, wants to refuse promotion, he may make a written request that he may not be promoted. The Appointing Authority taking relevant aspects into consideration shall consider such request. If the reasons adduced for refusal of promotion are acceptable to the Appointing Authority, the next public servant in the select list may be promoted. However, since it may not be administratively possible or desirable to offer appointment to the public servants who initially refused promotion, on every occasion on which a vacancy arises during the period of validity of the panel, no fresh offer of appointment on promotion shall be made in such cases for a period of one year from the date of refusal of first promotion or till a next vacancy arises, whichever is later. On the eventual promotion to the higher cadre / part of the service / pay scale of post, such public servant shall lose seniority vis-à-vis his juniors promoted in the preceding year to the higher cadre / part of the service / pay scale of post.

In cases where the reasons adduced by the public servant for his refusal for promotion are not acceptable to the Appointing Authority then he shall enforce the promotion on the public servant and in case the public servant still refuses to be

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promoted, then even disciplinary action may be taken against him for refusing to obey his order."

12. Under sub-rule (5) of Rule 6 of the Rules 2003 the D.P.C. is required to assess the suitability of the public servants for promotion on the basis of their service records and with particular reference to the Annual Confidential Reports for five preceding years. Under sub-rule (7) of Rule 6 of the Rules 2003 the D.P.C. is obliged to consider case of each public servant separately on the basis of their own merit and there shall be no need to make a comparative assessment of the merits of public servant. The D.P.C. is further required to consider the records of each public servant separately and shall categorize them as 'fit' or 'not fit'.

13. On careful perusal of the records, I found that the D.P.C. has considered the comparative assessment by recording 'very good', 'good' and 'not meet the required criteria', before categorizing 'fit' or 'not fit'.

14. Admittedly, there is no criminal case or departmental enquiry pending against the petitioner. The petitioner has also not been communicated with any adverse entry or remark which affects his right for promotion, if this is the case, the petitioner ought to have been categorized as 'fit' before considering for promotion on the basis of seniority.

15. In the case of Dharam Vir Singh Tomar (supra) cited by the petitioner the Supreme Court has considered the criteria of seniority subject to fitness as under: para-2

"2. Heard counsel for the appellant, the contesting respondent 5 and the Delhi Administration. The grievance of the appellant is that although he was senior to respondent 5 Vasu Chimnani, he was not placed in the selection grade while his junior was

granted that very scale. To support his contention of seniority, our attention was drawn to Annexure 'A' appended to the affidavit of January 4, 1982 (page 21). That document shows that the appellant was appointed on November 1, 1972, whereas respondent 5 was appointed on May 1, 1973. This would show that he was senior to respondent 5. It is obvious from the clarification issued by the Director of Education dated April 4, 1973, Annexure 'AA' (page 22) that Selection Grade to teachers was to be given on the basis of seniority, subject to fitness. The expression 'fitness' means that there should not be any adverse entry in the character rolls of the concerned person at least for the last three years and no disciplinary proceedings should be pending against him. So far as the appellant is concerned indisputably there was no adverse entry in his CRs nor was any disciplinary proceeding pending against him at the relevant point of time. Therefore, he was clearly fit to be placed in the Selection Grade and since he was senior to respondent 5, it is difficult to understand how his claim was by-passed."

16. In the case of Union of India Vs. Ltd. General Rajendra Singh Kadyan (supra) the Supreme Court has further clarified and interpreted the criteria of seniority subject to fitness as under - para-12

"12. Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All-India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

17. It is therefore evident that the seniority subject to fitness does not contemplate assessment of comparative merit of the candidates as the fitness is the basis of selection to categorize 'fit' on the basis of individual merits, considered separately. The select list is prepared thereafter on the basis of seniority for promotion to the post of Executive Engineer. In the present case the respondents have clearly assessed the criteria on the basis of the comparative assessment by recording their performance as 'very good', 'good' and 'does not meet the criteria', not on their own merit separately.

18. In the case of Gurdial Singh Fijji (Supra) cited by the petitioner, the Supreme Court has held as under-para 17

"17. The principle is well-settled that in accordance with the rules of natural justice, an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified."

19. In the case of Union of India Vs. E.G.Nambudiri (Supra), cited by the petitioner, the Supreme Court approves the ratio laid down in the case of Gurdial Singh Fijji (Supra).

20. Learned counsel for the respondents has relied upon a decision of Supreme Court in the case of U.P.S.C. Vs. K. Rajaiah and others, 2005 AIR SCW 3275 for the purpose that the D.P.C. is

competent to grade the candidates on the basis of their over all performance. The case of U.P.S.C. (Supra) was not a case where Rules are specific with regard to the selection of candidates for promotion to the higher post i.e. Executive Engineer on the basis of 'seniority subject to fitness' and as such the same is not applicable to the facts of the present case.

21. In the case of Badrinath (Supra), cited by the respondents, the Supreme Court has considered the assessment made by the Departmental Promotion Committee in regard to the merit or fitness for promotion when there was no rule. In the present case, there is a statutory provision for assessing the fitness of the candidates in accordance with Rule 6(7) of the Rules, 2003. The Departmental Promotion Committee has completely ignored the statutory provisions as enshrined in Rule 6(7) of the Rules, 2003, by assessing merits of the candidates on comparative assessment basis, not assessing separately on its own merit of a particular candidate for categorizing as 'fit' or 'not fit'.

22. There is no dispute that after making assessment of the candidates on the basis of the comparative assessment, the select list was prepared on seniority basis in accordance with Rule 6 (9) & (10) of the Rules, 2003. The present case, is an exceptional case, where the Departmental Promotion Committee has not complied with the statutory provisions i.e. Rules 6 (5) and 6 (7) of the Rules, 2003. Accordingly, this Court,in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India,has power to interfere with the assessment made by the Departmental Promotion Committee where the authorities have not complied with the statutory provisions.

23. In the present case the petitioner was not communicated any entry/remark which affects the right to promotion, as he was declared 'not fit' by the D.P.C. for promotion to the post of Executive Engineer on regular basis. The said adverse entry/remark, if any, is found, the same could not have been taken into consideration without affording an opportunity to the petitioner for submitting appropriate reply/explanation to the adverse entry/remarks made in the confidential report. As such, the assessment of the D.P.C. that the petitioner did not meet the required criteria is without any basis and deserves to be quashed. Further the D.P.C. has made comparative Assessment of all the candidates, which is in violation of the sub-rule (7) of Rule 6 of the Rules, 2003, thus, the entire proceedings deserve to be quashed.

24. For the reasons stated above ,the petition is allowed and the respondents are directed to consider the case of the petitioner along with other eligible candidates strictly in accordance with the provisions of the Rules, 2003 to grant promotion. Consequently, the impugned order dated 1.4.2005 stands quashed and set aside. The petitioner is entitled to continue as Executive Engineer on the basis of ad hoc promotion till the D.P.C. considers the case of the petitioner in accordance with the provisions of Rules, 2003.

The petition is accordingly allowed. No orders as to costs.

Sd/-
Satish K. Agnihotri
Judge